Obama's Unconstitutional Corner

His own Justice Department has provided an argument against him

BY JOSH BLACKMAN

THERE'S good news and bad news about President Obama's immigration executive action. The bad news first. He brazenly expanded the size and scope of prosecutorial discretion in an unprecedented executive power grab. But there is a silver lining: In justifying the reach of the policy, his own Justice Department imposed important constitutional limits on executive power.

If we take seriously the DOJ Office of Legal Counsel's 33-page memorandum spelling out what the president may and may not do under the auspices of prosecutorial discretion, it becomes evident that Obama's executive action on immigration, as well as his unilateral waivers of provisions of Obamacare, exceed the scope of that discretion. The president has violated and will likely continue to violate the outer bounds that his own administration has set. By attempting to craft a limiting principle, the Justice Department has backed the president into an unconstitutional corner.

The Obama administration's immigration policy has the effect of exempting up to 5 million people from deportation. How does it justify this non-enforcement of the law? To summarize the Office of Legal Counsel (OLC) memo, so long as the decisions not to deport "are made on a case-by-case basis," declining to execute the law is legal. "The guarantee of individualized, case-by-case review," the memo explains, "helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are *automatically* entitled to particular immigration relief." The last, best hope of a blanket non-enforcement policy is the appearance of an "individualized assessment."

I say "appearance" because it is not clear that the policy President Obama announced allows for an actual "individualized assessment." While the justification seems consistent with precedent—and OLC went out of its way to craft it that way—it is doubtful whether the policy in practice accords with this theory.

Consider President Obama's 2012 Deferred Action for Childhood Arrivals (DACA). This policy exempted from deportation over 1 million minors brought to the country without authorization. Homeland Security secretary Janet Napolitano's memo announcing DACA provided that DHS "should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis." (This language is virtually identical to that of the 2014 DHS memo announcing the latest policy.) Yet, despite the lip service paid to case-by-case consideration, a Brookings Institution report found that only 1 percent of applicants were denied deferrals. A 1 percent denial rate, or anything in that ballpark, seems awfully close to "automatic" relief. By way of an imprecise comparison, consider that a report by the Transactional Records Access Clearinghouse calculated that immigration judges denied roughly 50 percent of applications for asylum in 2010.

Further, DHS made the process of granting deferrals from deportation as lax as possible, as revealed by Freedom of Information Act requests from conservative watchdog group Judicial Watch. Specifically, field offices were asked to conduct only limited background checks, applicants without ID were still accepted for biometric processing, and there were widespread waivers of fees. Despite the insistence on prosecutorial discretion, the process seemed stacked to exempt from deportation everyone who met the bare requirements, and even those who lacked the appropriate identification or ability to pay the fees. There can be no pretense of prosecutorial discretion if DHS is wielding a rubber stamp.

There is every reason to think that President Obama's new policy will yield a similarly astronomically high rate of approved deferrals. In the memo from DHS secretary Jeh Johnson outlining the policy, there is absolutely no guidance about what the "exercise of discretion" should consist of and what the grounds are for rejecting an application. This must be a deliberate omission, because OLC felt compelled to acknowledge and address it. The OLC memo explains, "The proposed policy does not specify what would count as [a factor that would make a grant of deferred action inappropriate]; it thus leaves the relevant USCIS official with substantial discretion to determine whether a grant of deferred action is warranted."

While this absence of guidance should be a cause for concern, as it violates the very theory the memo just laid out, the Justice Department is satisfied. This rationalization is unsurprising in light of the origin of the executive action. The *New York Times* reported that the administration urged the legal team to use its "legal authorities to the fullest extent." When they presented the president with a preliminary policy, it was a "disappointment" because it "did not go far enough." Obama urged them to "try again." And they did just that. *Politico* reported that over the course of eight months, the White House reviewed over "60 iterations." The final policy, which received the president's blessing, pushes presidential power beyond its "fullest extent," as it embodies discretion in name only.

The president has created criteria that apply to millions, has essentially instructed his agents to automatically check off a few boxes, and calls this an individualized assessment. Such a policy cannot be constitutional. It is designed to exempt everyone who follows the application procedure. Against the backdrop of DACA, agents reviewing applications will quickly figure out how the administration wants them to proceed. Approving such applications is not an exercise of prosecutorial discretion, but of clerical approval. Such a rote task seems a far cry from the "individualized assessment" required by Obama's own Justice Department.

Beyond immigration, the same type of "prosecutorial discretion" was used to justify non-enforcement of Obamacare. For example, the so-called administrative fix waived the individual mandate's

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penalty for anyone who believes that he cannot afford to purchase health care as required by Obamacare. In other words, just about everyone. It seems this relief was virtually automatic for anyone who requested it, without any individualized assessment. Likewise with the employer mandate, from which the administration exempted all businesses with between 50 and 99 employees until 2016. It's unclear that any businesses that met these criteria were denied. The essence of discretion is that some applications are denied based on individual judgment. If virtually everyone's request is granted, discretion is a mere pretense.

It cannot be the rule of law for the president to create arbitrary criteria concerning where the law will not apply and then to instruct executive agencies to exempt anyone who meets those criteria. To quote the D.C. Circuit in a 1994 decision explaining the scope of the executive's powers, "A broad policy against enforcement poses *special risks* that [an agency] 'has consciously and expressly adopted a general policy that is so extreme as to amount to an *abdication* of its statutory responsibilities.'" Such an abdication is an affront to Congress's powers to write laws and the president's oath to "take Care that the Laws be faithfully executed."

The administrative fix to Obamacare is subject to a suit by the State of West Virginia, which is currently pending before a federal district court on a motion for summary judgment. The employer-mandate delay is the subject of the House of Representatives' recently filed lawsuit. Both challengers should amply cite the OLC memo to explain why the president's actions exceed the discretion afforded to him, with an important caveat. While Congress has vested the president with wide latitude over immigration, Congress has *not* given the president similarly broad unilateral power over the Affordable Care Act. What's more, the law imposes specific deadlines for when mandates shall be implemented, weakening whatever claim to discretion in this area the president had.

Despite the president's flagrant violation of the limits outlined by the OLC, the memo charts a course forward for Congress to reclaim its institutional authority. First, the OLC argues that because Congress appropriates only enough funds to deport 4 percent of those here unlawfully, the president must set priorities for how these limited resources are to be spent. Congress should respond by voicing its opposition to the president's preferences by appropriating more money for enforcement. One of the main legal arguments for his action would thus be weakened.

Second, the OLC justifies Obama's policy in part based on congressional acquiescence to past presidential executive actions on immigration. There's a fix to that too: Revise the statutes that vest the president with expansive prosecutorial discretion in this area. Make it clear that Congress does not agree that the commander-in-chief can abdicate his responsibility to enforce the laws.

Third, in a subtle move too cute by half, the memo explains that the cost of the president's program is "borne almost entirely" by the "collection of application fees." In other words, the administration warns, Congress can't defund the program. Here the president is thumbing his nose at the Constitution's requirement that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." That means by Congress. To fix this problem, Congress can restructure DHS's budget, so that it can use its power of the purse to control abuse. As the Congressional Research Service has noted, Congress can cut the funding for the president's policy. Through the passage of a new budget that "prohibited appropriated funds from being used for some specified purposes," the CRS explains, "the relevant funds would be [made] unavailable to be obligated or expended" on the president's executive action.

Now all of these remedies require the president's approval. The odds of receiving it between now and 2017 are slim. But we cannot forsake the Constitution. The next Congress, and the next president, should rededicate themselves to the rule of law, which has been on life support for far too long. As James Madison recognized in *Federalist* 51, "ambition must be made to counteract ambition." Congress must stop shirking its responsibility and reclaim the legislative mantle to check the executive. Through the power of the purse, and the drafting of precise laws, Congress can steer the separation of powers back to its proper constitutional moorings. **NR**

The New Overseer

What Jason Chaffetz learned from Henry Waxman

BY ELIANA JOHNSON

In October of 1990, Senator Alan Simpson, the Republican whip, emerged from an all-night negotiating session with his House counterparts on a series of clean-air regulations. What insights had he gained? "I learned that Henry Waxman is tougher than a boiled owl," he said, referring to California's long-serving Democratic congressman.

Years later, George W. Bush and his administration would learn the same. In 2007 Waxman became chairman of the House Committee on Oversight and Government Reform, a panel with powers unique across Congress: to issue subpoenas requiring witnesses to produce documents, testify at hearings, and show up for depositions. The irascible Californian exercised his powers masterfully. Recall the explosive testimony of former CIA operative Valerie Plame Wilson, who first appeared on camera before Waxman's committee; the investigation into the death in Afghanistan of NFL safety turned Army Ranger Pat Tillman by what turned out to be friendly fire; and the hearings on the security contractor Blackwater, which thrust the company's business practices into the national spotlight and ultimately led to its demise.

Surveying today's political landscape, rife with scandal and malfeasance, Republicans could use their own Henry Waxman: a shrewd and tenacious operator, a consummate Washington insider, somebody who by sheer force of will can wring concessions and, ultimately, grudging respect from his enemies—after taking a few scalps.

As it turns out, one Republican congressman has been taking notes from Waxman, and in November he was elected chairman of the Oversight Committee, to begin in January. Jason Chaffetz, with his mop of curls, warm demeanor, and broad smile, bears little resemblance to the acerbic Waxman. In lobbying for the chairmanship, he sold himself as a kinder and friendlier version of the current